

STATE OF MICHIGAN
DEPARTMENT OF LABOR AND ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

Andrew Bothwell,
Petitioner

v

Case No. 10-790-L
Docket No. 2010-1051

Office of Financial and Insurance Regulation,
Respondent

For the Petitioner:

Dale Schaller
Parker and Parker
704 E. Grand River Avenue
P.O. Box 888
Howell, MI 48844

For the Respondent:

William Peattie
Office of General Counsel
Office of Financial and Insurance Regulation
P.O. Box 30220
Lansing, MI 48909

Issued and entered
this 22nd day of April 2011
by R. Kevin Clinton
Commissioner

FINAL DECISION

This case concerns the application of Andrew Bothwell (Petitioner) for a resident insurance producer license. Petitioner filed his application with the Office of Financial and Insurance Regulation (OFIR) in May 2010. On the application, Petitioner failed to disclose that he had been convicted in 2008 of three counts of issuing NSF checks and in 2009 of retail fraud. The offenses are misdemeanors. Following a pre-licensing review, the convictions were discovered and the license application was denied based on the Petitioner's failure to disclose those convictions. Deputy Commissioner Jean Boven issued a Notice of License Denial and Opportunity for Hearing in June 2010.

Petitioner challenged the license denial. A hearing was held on December 15, 2010.

The Administrative Law Judge issued a Proposal for Decision (PFD) dated February 8, 2011 recommending that the Commissioner uphold the license denial. Neither party filed exceptions.

The factual findings in the PFD are in accordance with the preponderance of the evidence and the conclusions of law are supported by reasoned opinion. Those findings and conclusions are adopted. The PFD is attached and made part of this final decision.

In addition to the considerations above, it is noted that the Petitioner did not file exceptions to the Proposal for Decision. Michigan courts have long recognized that the failure to file exceptions constitutes a waiver of any objections not raised. *Attorney General v. Public Service Comm* 136 Mich App 52 (1984).

ORDER

Therefore, it is ORDERED that the refusal to issue an insurance producer license to the Petitioner Andrew Bothwell is upheld.



R. Kevin Clinton
Commissioner

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	Docket No.	2010-1051
Andrew G. Bothwell, Petitioner	Agency No.	10-790-L
V	Agency:	Office of Financial and Insurance Regulation
Office of Financial and Insurance Regulation, Respondent	Case Type:	Intent to Deny/Refusal to License

RECEIVED

Issued and entered
this 8th day of February, 2011
by Renée A. Ozburn
Administrative Law Judge

FEB 09 2011

OFIR/OGC

PROPOSAL FOR DECISION

On May 9, 2010, Andrew Bothwell (Petitioner) filed an Application for an Insurance Producer License with the Office of Financial and Insurance Regulation (Respondent/OFIR). On June 16, 2010, OFIR issued a Notice of License Denial and Opportunity for Hearing. On June 30, 2010, Mr. Bothwell filed a Petition for a Contested Case Hearing to Appeal Agency Denial of Application for Insurance Producer License. An Order Referring Complaint for Hearing was issued on September 27, 2010.

A hearing was held on December 15, 2010. Attorney Dale Schaller appeared for Mr. Bothwell. Attorney William Peattie appeared for OFIR. Andrew Bothwell testified on his own behalf. Deputy Commissioner Jean Boven testified on behalf of OFIR.

ISSUES AND APPLICABLE LAW

The June 16, 2010 Notice of License Denial cites the Michigan Insurance Code (Code), 1956 PA 218, as amended, MCL 500.100 *et seq.*, Sections 1205 and 1239(1)(a) as the basis for OFIR's refusal to license Mr. Bothwell. In pertinent part,

Sections 1205 and 1239(1)(a) state:

Sec. 1205.

(1) A person applying for a resident insurance producer license shall file with the commissioner the uniform application required by the commissioner and shall declare under penalty of refusal, suspension, or revocation of the license that the statements made in the application are true, correct, and complete to the best of the individual's knowledge and belief. An application for a resident insurer producer license shall not be approved unless the commissioner finds that the individual meets all of the following:

* * *

(b) Has not committed any act listed in section 1239(1).

Sec. 1239.

(1) In addition to any other powers under this act, the commissioner may place on probation, suspend, or revoke an insurance producer's license or may levy a civil fine under section 1244 or any combination of actions, and the commissioner shall refuse to issue a license under section 1205 or 1206a, for any 1 or more of the following causes:

(a) Providing incorrect, misleading, incomplete, or materially untrue information in the license application.

SUMMARY OF EVIDENCE

The Petitioner did not offer any Exhibits.

Respondent Exhibits:

Exhibit A	On-Line License Application dated 5/10/10
Exhibit B	Blank NAIC Uniform Producer License Application
Exhibit C	Register of Court Actions
Exhibit D	Misdemeanor Complaint dated 10/2/09
Exhibit E	Letter from OFIR to A. Bothwell dated 5/13/10
Exhibit F	Letter from A. Bothwell to OFIR (undated)
Exhibit G	OFIR Notice of License Denial dated 6/16/10

Andrew Bothwell filed an Application for Individual Producer License using OFIR's on-line application process. The National Association of Insurance Commissioners (NAIC) drafted the uniform application used for OFIR's on-line application process (Exhibit B). After an applicant completes and submits the application electronically, OFIR's system transcribes the answers into a format (Exhibit A) designed to coordinate with OFIR's application data base.

Mr. Bothwell checked 'No' in response to the following on Page 3 of the NAIC on-line application, entitled 'Background Information':

The Applicant must read the following very carefully and answer every question. All written statements submitted by the Applicant must include an original signature.

1. Have you ever been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime?

"Crime" includes a misdemeanor, felony or a military offense. You may exclude misdemeanor traffic citations or convictions involving driving under the influence (DUI) or driving while intoxicated (DWI), driving without a license, reckless driving, or driving with a suspended or revoked license and juvenile offenses. "Convicted" includes, but is not limited to, having been found guilty by verdict of a judge or jury, having entered a plea of guilty or nolo contendere, or having been given probation, a suspended sentence or a fine.

If the answer is yes, you must attach to this application:

- a) a written statement explaining the circumstances of each incident.
- b) a copy of the charging document.
- c) A copy of the official document, which demonstrates the resolution of the charges or any final judgment.

OFIR Deputy Commissioner Jean Boven testified that background checks are conducted on all applicants. The background check on Mr. Bothwell turned up a guilty plea to three counts of "Non-sufficient Funds \$100.00 or Less" issued on 1/02/08 (Exhibit C) and a misdemeanor complaint issued on 10/02/09 for "Retail Fraud- Third Degree" (Exhibit D).

As a result of the discrepancy between Mr. Bothwell's application answer and the background check findings, OFIR Department Technician Jennifer Fletcher sent Mr. Bothwell correspondence dated May 13, 2010 (Exhibit E). The correspondence asks Mr. Bothwell to explain why the information discovered during the background check was not disclosed on the application.

Mr. Bothwell asserts that he discovered the error in his application answer a few days after submitting the application on May 9, 2010, and called Ms. Fletcher on May 11, 2010 before he received the May 13, 2010 correspondence. In addition, he asserts that he drove to Midland Michigan and personally delivered the Exhibit C & D conviction documents to OFIR. Mr. Bothwell also sent OFIR an undated correspondence (Exhibit F) stating that he did not intentionally withhold information. Further, he asserts that when he read the application, he thought the convictions question only pertained to felony cases.

Mr. Bothwell does not believe his non-sufficient funds and retail fraud convictions reflect any dishonesty on his part. The three checks that were returned for non-sufficient funds were for \$11, \$14 and \$18. The checks were written shortly after he had moved to Wisconsin. He was not getting his mail yet, and he was unaware that funds were not in his account. He repaid the money and took a court mandated check balancing class. The retail fraud case resulted when he forgot an item on the bottom of his grocery cart, while talking on the phone during check out. When he was stopped on his way out of the store, management indicated that they were strictly enforcing a policy to treat such incidents as thefts. He plead no contest to the charge because he was working in Wisconsin and coming back to Michigan to contest the charge would have been difficult. He paid restitution and a fine.

Deputy Commissioner Boven indicated that an amended application is allowed before a background check is conducted or a Notice of License Denial is issued. Ms. Boven acknowledged that non-sufficient checks do not automatically indicate dishonesty if mistakes are promptly corrected. Ms. Boven asserts that decisions to deny a license are made on an individual basis. Ms. Boven made the decision to issue the Notice of License Denial (Exhibit G) in this case because the nature of the convictions indicated conduct conflicting with the fiduciary responsibilities of a licensed producer. In addition, Mr. Bothwell's failure to adequately read and/or understand application questions for purposes of providing correct and truthful answers, indicates a lack of skill necessary for entrusting the public to a licensee.

Mr. Bothwell testified that he was diagnosed with ADHD when he was about 11 or 12 years old. Because of the ADHD diagnosis, during grade school and college he had tutors, was provided with reading assistance and was allowed to take untimed tests. He took Ritalin until he was 23. He is currently 32. Although he still has ADHD, and continues to see a psychiatrist, he no longer takes medication. He practices Tai Chi to help him stay organized. Mr. Bothwell opines that his ADHD played a part in his failure to read the entire application question regarding convictions before answering. He felt pressure to get the application process finished because he had already been hired by AFLAC.

Mr. Bothwell graduated from Winona State University in Minnesota in 2002. From 2003 to 2009 he worked in advertising and sales for Yellowbook. In May 2010 he became vice president for a global IT staffing firm. From August 2010 through the hearing in December 2010, he has been working as a sales representative at Verizon.

Mr. Bothwell desires to work as an insurance producer with AFLAC. Mr. Bothwell does not believe his ADHD will affect his work with AFLAC or his ability to serve the public because he is good with sales and with people.

FINDING OF FACT

1. Andrew Bothwell submitted an on-line application for an insurance producer license on May 9, 2010.
2. Mr. Bothwell failed to carefully read the application instructions which begin: "The Applicant must read the following very carefully and answer every question."
3. Mr. Bothwell assumed the question regarding convictions for a crime only applied to felony convictions and answered 'No' without reading the definition of "crime".
4. After a background check disclosed misdemeanor convictions for non-sufficient funds and retail fraud, OFIR sent correspondence to Mr. Bothwell, dated May 13, 2010, asking for an explanation.
5. Mr. Bothwell attempted to explain the circumstances of his convictions in an undated letter sent to OFIR.
6. Mr. Bothwell has an on-going ADHD condition, which is no longer being treated with medication and which may result in inadvertent inattention to detail if he does not receive assistance to thoroughly read and comprehend documents.
7. The underlying facts of Mr. Bothwell's convictions indicate that they were for misdemeanor offenses caused by inadvertent inattention rather than dishonesty.
8. Mr. Bothwell's work history indicates experience in sales.

CONCLUSION OF LAW

The Notice of License Denial issued by OFIR indicates that an applicant alleged to have provided misleading, incomplete or materially untrue information on a license application can petition for a hearing to appeal denial if they can show they did not provide misleading information *or* if they "have another explanation as to why such information was or was not in" the application. The above Findings of Fact establish that Mr. Bothwell submitted an application answer that was incorrect, misleading and materially untrue.

OFIR cites a previous OFIR final decision (*Mazur v Office of Financial and Insurance Services*) to support its contention that the Commissioner has no discretion to issue a license under Code Section 1205 if a applicant submits incorrect, misleading, incomplete or materially untrue information on a license application. In a Michigan Supreme Court decision issued on December 29, 2010 in the matter of *King v State of Michigan Department of Labor and Economic Growth, and Commissioner of the Office of Financial and Insurance Regulation*, 2015 WL 53934909 (Mich), the court stated:

It remains the law today that no licensing agency may make a finding as to an applicant's moral character on the sole basis of a criminal conviction. MCL 338.42. It also remains the law that "orders, decisions, findings, rulings, determinations, opinions, actions, and inactions of the commissioner in [the Insurance Code] shall be made or reached in the reasonable exercise of discretion." MCL 500.205.

In addition, the court in *King* reasoned:

Consistent with MCL 500.205, the licensure requirement mandates that the commissioner make a discretionary judgment call when reviewing an application and deny the application if he or she concludes – in the exercise of that discretion- that denial, suspension, or revocation would be appropriate.

Mr. Bothwell's problems with inattention to detail are ongoing as evidenced by his recent (2008 and 2009) convictions and incorrect application answer in 2010. Mr. Bothwell has a history of problems with concentration and a need for

assistance to read instructions and questions. The capability to read, understand and explain voluminous and tedious insurance documents is integral to advising and assisting consumers. Once licensed, there are no requirements or guarantees that a licensee will have reading assistance available.

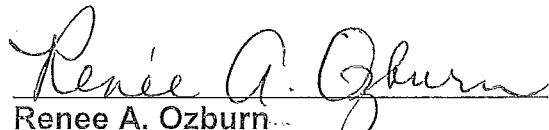
Mr. Bothwell failed to provide any substantive mitigating explanation for his incorrect application answer. Further, there is no evidence that his problems with inattentiveness are under control in a manner that he can be entrusted with a license to safely handle consumer fiduciary matters as an insurance producer. Therefore, OFIR's decision to deny a license pursuant to Code sections 1205 and 1239 was appropriate.

PROPOSED DECISION

Pursuant to the above Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge proposes that the Commissioner affirm the decision denying an insurance producer license to Andrew Bothwell.

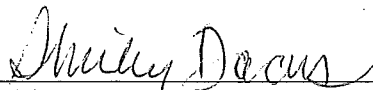
EXCEPTIONS

The parties may file Exceptions to this Proposal for Decision within 20 days after it is issued. Exceptions should be addressed to the Office of Financial and Insurance Services, 611 W. Ottawa Street, 3rd Floor, P.O. Box 30220, Lansing, Michigan 48909, Attention: Dawn Kobus.


Renee A. Ozburn
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 8th day of February, 2011.



Shirley Dacus

State Office of Administrative Hearings and Rules

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